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In The

UNITED STATES SUPREME COURT

October Term, 1996

ALAN LESLIE HIMBER,

Petitioner,

vs.

THOMAS D. POWERS, et al.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

1. Does dismissal of a bankruptcy appeal involving substantial property rights of the Petitioner, due to a patently incorrect reading of Bankruptcy Rule 8006 by a Federal District Court, deny the Petitioner rights of Due Process under the Fifth Amendment to the Constitution?

2. Can a pro se Appellant's bankruptcy appeal be dismissed by a District Court for failure to timely file an Appellant's Brief where the District Court has not imposed any lesser sanctions prior to such dismissal?

LIST OF ALL PARTIES TO PROCEEDING

1. Alan Leslie Himber.
2. Thomas D. Powers.
3. R. Carter Pate.
4. NBH Liquidating Trust.

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CASE NO. _____

In The

UNITED STATES SUPREME COURT

October Term, 1996

ALAN LESLIE HIMBER,

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vs.

THOMAS D. POWERS, et al.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Alan Leslie Himber, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The orders entered by the and Court of Appeals are attached as Appendix A to this petition. The District Court's memorandum of decision appear as Appendix B.

✦

JURISDICTION

This proceeding arises from the dismissal of an appeal of a Bankruptcy Court order by the United States District Court, Northern District of Texas, Dallas Division.[1] An appeal of the District Court's Final Judgment was timely filed by the Petitioner with the Fifth Circuit Court of Appeals. On May 8, 1997, the Fifth Circuit affirmed the Final Judgment of the District Court. A petition for rehearing was timely filed by the Petitioner, and was denied by the Fifth Circuit Court of Appeals on June 27, 1997. This Court may review the Court of Appeals' decision by writ of certiorari. *28 U.S.C. § 1254.*

✦

STATUTORY PROVISIONS INVOLVED[2]

This case does not involve interpretation of any statutory authority, but instead involves interpretation of Bankruptcy Rules 8006 and 8009, and the Fifth Amendment to the Constitution of the United States.

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1 The Honorable Robert B. Maloney, District Judge.

2 Copies of applicable Bankruptcy Rules are set forth in Appendix C filed herein pursuant to Rule 14.1(k) of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings and Disposition in the Court Below.

On May 8, 1997, the United States Court of Appeals for the Fifth Circuit[3] filed its Per Curiam Opinion affirming a Final Judgment by the U.S. District Court, Northern District of Texas,[4] dismissing a bankruptcy appeal. A Petition for Rehearing was timely filed by Alan Leslie Himber ("Himber" or "Petitioner"), Petitioner herein, which was denied by the Fifth Circuit Court of Appeals on June 27, 1997.

B. Statement of the Facts.

In February 1996, a United States Bankruptcy Judge entered an Order approving a Settlement Agreement, adversely affecting substantial property rights of Petitioner. After the Bankruptcy Court heard and denied Petitioner's motion to the Bankruptcy Court for reconsideration of the approval of the settlement agreement, Petitioner timely filed a Notice of Appeal to the District Court.

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[3] The panel consisted of Judges Jones, DeMoss and Parker.

[4] The Honorable Robert B. Maloney, District Judge.

In connection with the appeal, Petitioner, acting pro se, timely filed with the Bankruptcy Court his Designation of Contents for Inclusion in Record on Appeal and Statement of Issues on Appeal and Transcript Order, as required by the Bankruptcy Rules. Instead of following correct and standard court procedure (which Petitioner had been told would be followed) and waiting for the transcript to be prepared by the court reporter and transmitted to the bankruptcy clerk for submission into the appellate record, the bankruptcy clerk, negligently and in error, prematurely transmitted the record to the District Court categorizing it as "deficient." The Petitioner, operating in good faith under the quite reasonable and logical assumption that the clerk would not transmit the record until the transcript had been prepared (and, knowing that the transcript had indeed not yet been prepared) did not become aware of the clerk's negligence until after the premature filing deadline that had been triggered by the clerk's premature transmittal of the record. This resulted in Petitioner being unable to timely file his Appellate Brief.

The failure of Petitioner to timely file his Appellant Brief with the District Court was not due to conscious indifference, to prejudice

any party or out of any disregard or disrespect for the District Court and its rules and procedures.

Less than one month after the premature docketing of the appeal with the District Court, Appellee R. Carter Pate ("Appellee Pate") filed his Appellee's Motion to dismiss and Brief in Support (the "Motion").

REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS' RULING THAT BANKRUPTCY RULE 8006 REQUIRES AN APPELLANT TO PROVIDE COPIES OF ITEMS DESIGNATED ON APPEAL IS A SIGNIFICANT DEPARTURE FROM THE PLAIN MEANING OF THE RULE, AND DISMISSAL OF PETITIONER'S APPEAL DUE TO SUCH A SIGNIFICANT DEPARTURE HAS VIOLATED PETITIONER'S DUE PROCESS.

The first ground for dismissal of the Petitioner's appeal, that Petitioner failed to make copies of items designated on appeal, is incorrect on the face of Bankruptcy Rule 8006 (the Rule cited as grounds for dismissal), and has resulted in the denial of due process of law to the Petitioner.

The District Court, in its Order Granting Motions to Dismiss Bankruptcy Appeal (the "Dismissal Order"), stated that

> an appellant has a duty to designate an adequate record of the

> proceedings before the Bankruptcy Court so that this Court is able to consider the issues raised on the appeal.

There is no question that the District Court's statement as to designation is true. However, Petitioner did his duty. He did not fail to comply with the provisions of Bankruptcy Rule 8006 regarding designation. Instead, the Court found that the Petitioner had failed to make copies and provide such copies of items from the record to the bankruptcy clerk for inclusion into the record that the clerk was putting together to docket with the District Court.

Bankruptcy Rule 8006 itself provides that in the event of the failure of an Petitioner to provide copies, the clerk shall make the copies.[5] There is no support, whatsoever, for the dismissal of the Petitioner's Appeal on the ground of failure to make copies. Dismissal of Petitioner's appeal based on a clear misreading of Bankruptcy Rule

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[5] Bankruptcy Rule 8006 provides, in relevant part, that

> Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense.

Bankruptcy Rule 8006 (emphasis supplied).

8006 has left Petitioner without a legal remedy to challenge a settlement that took substantial property rights away from the Petitioner, and has therefore violated Petitioner's due process of law, guaranteed by the Fifth Amendment to the Constitution of the United States.

B. FAILURE OF THE FIFTH CIRCUIT COURT OF APPEALS TO FIND AN ABUSE OF DISCRETION BY THE DISTRICT COURT IN THE DISMISSAL OF THE PETITIONER'S APPEAL IS A SIGNIFICANT DEPARTURE FROM WELL ESTABLISHED PRECEDENT, HAS VIOLATED THE DUE PROCESS OF THE PETITIONER, AND IS IN CONFLICT WITH DECISIONS OF SEVERAL OTHER COURTS OF APPEALS.

Bankruptcy Rule 8009(a)(1) provides that the appellant brief shall be filed within fifteen days after the entry of the appeal on the docket. Petitioner's Appellant Brief was not timely filed due to a premature transmission of the record by the bankruptcy clerk to the District Court without the submission of a transcript.

Bankruptcy Rule 8001 provides that

> Failure of an Appellant to take any step other than the timely file of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which <u>may</u> include dismissal of the appeal.

The Ninth Circuit Court of Appeals has recently addressed the

permissive language regarding dismissal of an appeal contained in Bankruptcy Rule 8001 in Thomas Brothers Restaurant v. Taco Bell Royalty Corp. (In re Thomas), 1996 U.S. App. LEXIS (9th Cir. 1996), and stated that

> When any court is considering the imposition of sanctions for non-jurisdictional, procedural defaults and deficiencies in the management of litigation, the selection of the sanction to be imposed must take into consideration the impact of the sanction and the alternatives available to achieve assessment of the penalties in conformity with fault. Absent such consideration, there is an abuse of discretion.

The ruling of the Fifth Circuit Court of Appeals upheld the District Court's dismissal of the appeal without considering any lesser sanction for Petitioner's failure to file the brief, and is therefore in conflict with requirements set forth by the Ninth Circuit.

Likewise, in Matter of Scheri, 51 F.3d 71 (7th Cir. 1995), the Seventh Circuit Court of Appeals recently opined on Bankruptcy Rule 8001 as it relates to the dismissal of a bankruptcy appeal in the context of the late filing of a brief. In Scheri, the debtor, acting through his attorney, failed to file an appellate brief in the allotted time period. The district court dismissed his appeal. The Appellant argued that the dismissal was an abuse of the district court's discretion. The Seventh

Circuit vacated the judgment of the district court and remanded the case for further consideration, holding that the failure to file a timely brief is a nonjurisdictional procedural error. Like the Ninth Circuit, the Seventh Circuit held that in the event that there is a failure to timely file a brief, the district court must choose the "appropriate" action. The Fifth Circuit's rulings in this Case do not comport with the guidelines enacted by the Ninth and Seventh Circuit Courts of Appeals.

Furthermore, in determining the appropriate action for the district court to take, the Seventh Circuit Court noted that bankruptcy scholar and former bankruptcy judge Daniel R. Cowans has stated the principle that reflects the general approach of the reported cases: "Dismissal of an appeal for failure to file a brief is a severe sanction." Daniel R. Cowans, Bankruptcy Law & Practice § 18.6, at 530 (6th ed. 1994). The Seventh Circuit noted that the perspective stated by Cowans is not limited to bankruptcy practice, but has long characterized the Seventh Circuit's approach to dismissal sanctions. Citing Halas v. Consumer Servs., Inc., 16 F.3d 161, 165 (7th Cir. 1994) (acknowledging that dismissal with prejudice is a harsh sanction, but appropriate when discovery delays continue long after the court's direct

order).

Another Circuit Court that has recently addressed the issue of dismissal of an appeal under Bankruptcy Rule 8009 in a manner conflicting with the Fifth Circuit's ruling in the present case is RTC v. SPR Corp. (In re SPR Corp.), 45 F.3d 70 (4th Cir. 1995). In SPR, the Fourth Circuit stated that prior to dismissing an appeal under Bankruptcy Rule 8001 (a), a district court must take at least one of the following steps:

> (1) make a finding of bad faith or negligence; (2) give the Petitioner notice or an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on the other parties; or (4) indicate that it considered the impact of the sanction and available alternatives.

Under the present facts, there is no showing that the District Court did any of the above four things.

Another Circuit Court that has ruled on this issue is the Sixth Circuit Court of Appeals, in Third Nat'l Bank v. The Winner Corp. (In re Winner Corp.), 632 F.2d 658 (6th Cir. 1980), where the Court held that the district court should impose a penalty short of dismissal unless the derelict party has engaged in "bad faith or contumacious conduct". The Sixth Circuit went on to say that a late filing does not justify

dismissal of the appeal absent a showing of bad faith, negligence, or indifference. Again, there is no evidence in the record that supports any such behavior by the Petitioner, and there were no such findings by the District Court. The Fifth Circuit's rulings based on such a dismissal are in conflict with the guidelines set forth by the Sixth Circuit Court of Appeals.

Based on the record in this case, the District Court abused its discretion in dismissing Petitioner's Appeal. The standard utilized by the District Court, and effectively upheld by the Fifth Circuit Court of Appeals, are in conflict with guidelines and standards for dismissal of an appeal set forth by the Ninth, Fourth, Seventh, and Sixth Circuit Courts of Appeals.

By improperly dismissing the appeal, Petitioner will lose entitlement to substantial assets and remedies without any legal recourse or ability to challenge the Bankruptcy Court's rulings on appeal. Such a lack of legal recourse has violated Petitioner's rights of Due Process of Law guaranteed by the Fifth Amendment to the Constitution of the United States.

DATED: September 25, 1997.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No.96-11232
Summary Calendar

In The Matter of: ALAN LESLIE HIMBER
Debtor.

ALAN LESLIE HIMBER,
Appellant,

VERSUS

THOMAS D. POWERS; NBH LIQUIDATING TRUST; R. CARTER PATE,
Appellees.

Appeal from the United States District Court for the Northern District of Texas
(3:96-CV-1719-T)

(Filed May 8, 1997)

Before JONES, DEMOSS and PARKER, Circuit Judges.

PER CURIAM:[1]

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[1] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Appellant Alan Leslie Himber ("Himber") appeals the district court's dismissal of his appeal from the bankruptcy court's settlement approval. The district court dismissed Himber's appeal because (1) Himber failed to provide the court with all of the items designated as part of the record on appeal thus presenting a deficient record in violation of Bankruptcy Rule 8006, and (2) Himber did not timely file his appellate brief, in violation of Bankruptcy Rule 8009. We review such decisions for an abuse of discretion. *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1304-05 (5th Cir. 1985). After having reviewed the record and the parties' arguments, we fail to see any abuse of discretion by the district court in its decision to dismiss Himber's appeal and we AFFIRM the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No.96-11232

In The Matter of: ALAN LESLIE HIMBER
Debtor.
- -

ALAN LESLIE HIMBER
Appellant

v.

THOMAS D. POWERS; NBH LIQUIDATING TRUST; R. CARTER PATE,
Appellees.

Appeal from the United States District Court for the Northern District of Texas, Dallas

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(Filed June 27, 1997)

ON PETITION FOR REHEARING

Before JONES, DEMOSS and PARKER, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in th above case is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: ALLAN LESLIE HIMBER,

Debtor,

ALAN LESLIE HIMBER,

Appellant,

v. No. 3:96-CV-1719-T

THOMAS D. POWERS,
et al.,

Appellees.

ORDER GRANTING APPELLEES' MOTIONS TO DISMISS BANKRUPTCY APPEAL

(Filed August 9, 1996)

Before: ROBERT B. MALONEY, United States District Judge

Before the Court are the Motions to Dismiss Bankruptcy Appeal, filed under separate cover by Appellees Thomas D. Powers and R. Carter Pate. The Motions are opposed. After considering the motions, the response, the replies, and the Clerk's Certificate of

Deficiency, the Court is of the opinion that the motions should be granted.

Appellant Alan Leslie Himber filed his notice of appeal in this bankruptcy case on May 28, 1996. The Bankruptcy Clerk transmitted the appeal to this Court on October 26, 1995. The Bankruptcy Clerk certified that the record on appeal is deficient because Himber failed to provide copies of designated items in violation of Bankruptcy Rule 8006. Himber has also failed to file his appellant brief in accordance with Bankruptcy Rule 8009. Appellees request that the Court dismiss this appeal pursuant to Bankruptcy Rule 8001.

An appellant has a duty to designate an adequate record of the proceedings before the Bankruptcy Court so that this Court is able to consider the issues raised on the appeal. FED. R. BANKR. P. 8006; *Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743, 745 (5th Cir. 1976); *W.T. Grant Co. v. Rodman*, 432 F. Supp. 105 (S.D.N.Y. 1977) (discussing items to be included on a bankruptcy appeal), *aff'd*, 559 F.2d 1206 (2d Cir. 1977). Failure to provide an adequate record or to timely file an appellate brief are grounds for dismissal of the appeal. *Coats v. Pierre*, 890 F.2d 728, 731 (5th Cir. 1989); *Har-Dway House*

Statuary, Inc., 76 F.R.D. 204, 205 (E.D. Mo. 1977) (dismissing a bankruptcy appeal for failure to file a brief).

In this case, Himber contends that he failed to comply with the Bankruptcy Rules because he was unaware of the proper time requirements for filing an appellate brief and "did not check his mailbox and was unaware that the record had been docketed." Himber also accuses the Bankruptcy Clerk of prematurely transmitting the record to this Court.

First, there is no evidence that the Bankruptcy Clerk acted improperly. Second, the Court is of the opinion that the reasons stated by Himber do not justify his delay. The Court will dismiss this Bankruptcy appeal pursuant to Bankruptcy Rule 8001.

It is therefore **ORDERED** that the Motion to Dismiss Bankruptcy Appeal filed by Appellee R. Carter Pate, on July 10, 1996, is **granted**.

It is **FURTHER ORDERED** that the Motion to Dismiss Bankruptcy Appeal filed by Appellee Thomas D. Powers, on July 18, 1996, is **granted**.

It is **FURTHER ORDERED** that this Bankruptcy Appeal is

dismissed with prejudice.

Signed on this 9th day of August, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: ALLAN LESLIE HIMBER,

Debtor,

ALAN LESLIE HIMBER,

Appellant,

v. No. 3:96-CV-1719-T

THOMAS D. POWERS,
et al.,

Appellees.

FINAL JUDGMENT

(Filed August 9, 1996)

Before: ROBERT B. MALONEY, United States District Judge

This action came before the Court, Honorable Robert B. Maloney, presiding, and the issues having been duly considered and a decision having been rendered:

It is **ORDERED** and **ADJUDGED** that the appeal of Appellant Alan Leslie Himber is **dismissed with prejudice**.

It is **FURTHER ORDERED** and **ADJUDGED** that all relief not specifically granted herein is denied.

SIGNED 9th day of August, 1996.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: ALLAN LESLIE HIMBER,

Debtor,

ALAN LESLIE HIMBER,

Appellant,

v. No. 3:96-CV-1719-T

THOMAS D. POWERS,
et al.,

Appellees.

ORDER DENYING APPELLEE'S MOTION FOR RECONSIDERATION

(Filed August 28, 1996)

Before: ROBERT B. MALONEY, United States District Judge

Before the Court is the Motion for Reconsideration filed by Appellee Alan Leslie Himber. After considering the motion, the Court is of the opinion that it should be denied.

Himber requests reconsideration of the Court's order dismissing this appeal for failure to comply with the Bankruptcy Rules. Aside from various derogatory remarks directed at this Court and the Bankruptcy Clerk, Himber argues nothing new which would justify reconsideration of the Court's previous order.

It is therefore **ORDERED** that the Motion for Reconsideration filed by Appellee Alan Leslie Himber, on August 23, 1996, is **denied**.

Signed this 28th day of August, 1996.

FIFTH AMENDMENT DUE PROCESS CLAUSE

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

FEDERAL RULES OF BANKRUPTCY PROCEDURE 8001

Manner of Taking Appeal: Voluntary Dismissal

(a) Appeal as of Right; How Taken. An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to the appropriate Official Form, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

FEDERAL RULES OF BANKRUPTCY PROCEDURE 8006

Record and Issues on Appeal

Within 10 days after filing the notice of appeal as provided by

Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its costs. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

FEDERAL RULES OF BANKRUPTCY PROCEDURE 8009

Briefs and Appendix; Filing and Service

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits.

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007.

(2) The appellee shall serve a file a brief within 15 days after service of the brief of appellant. If the appellee has filed a cross appeal, the brief of the appellee shall contain the issues and argument pertinent to the cross appeal, denominated as such, and the response to the brief of the appellant.

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may file and serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(b) Appendix to Brief. If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with the appellant's brief excerpts of the record as an appendix, which shall include the following:

(1) The complaint and answer or other equivalent pleadings;

(2) Any pretrial order;

(3) The judgment, order, or decree from which the appeal is taken;

(4) Any other orders relevant to the appeal;

(5) The opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;

(6) Any motion and response on which the court rendered decision;

(7) The notice of appeal;

(8) The relevant entries in the bankruptcy docket;

and

(9) The transcript or portion thereof, if so required by a rule of the bankruptcy appellate panel.

An appellee may also serve and file an appendix which contains material required to be included by the appellant but omitted by appellant.